COURT OF APPEALS
DECISION
DATED AND RELEASED

August 19, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0552

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STAN SMITH, INC.,

PLAINTIFF-APPELLANT,

V.

ROBERT FRANSWAY, ROBERT'S CONSTRUCTION COMPANY AND SPRINGBROOK CERCLE PARTNERSHIP,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Stan Smith, Inc. (Smith), appeals from an order denying its motion for reconsideration following the trial court's dismissal of its action against Robert Fransway, Robert's Construction Company, and Springbrook Cercle Partnership (collectively, "Fransway"). We affirm.

In August 1991, Smith, an excavation/grading contractor, contracted to provide excavation and grading services at Fransway's residential real estate development. The contract specified the cost and services Smith would provide and further specified that change orders would be required for additional work. No change orders were ever made but, in March 1993, after completion of all the work, Smith submitted a bill to Fransway for $107,970 more than the contract price, for 91,500 cubic yards of additional fill Smith claimed to have moved during the final stages of the project.

Smith sued Fransway, among others, claiming negligent misrepresentation and quantum meruit. Several defendants resolved their disputes with Smith and were dismissed from the case at various stages. This appeal involves only Smith's action against Fransway.

At the jury trial, almost all the testimony and argument related to the negligent misrepresentation claim and the issue of whether the defendants had prepared erroneous information on which Smith had relied in bidding the project. The parties and trial court, however, also addressed the quantum meruit claim and, further, did so in a way that assumed that the quantum meruit claim included an unjust enrichment claim.

Smith called three witnesses: Pete Bailey, a defendant and land surveyor whose company had done some of the work on the project; Anthony Karpfinger, a self-employed civil engineer who, acting as Smith's agent, had participated in the preparation of Smith's bid for the project and who ultimately had supervised Smith's work on the project; and Thomas Wolf, a civil engineer Smith hired to determine whether Smith had moved additional volumes of earth that had not been reflected in the bidding documents. At the conclusion of Smith's

presentation, Fransway rested without calling witnesses and moved for directed verdict. In a brief oral decision addressing the negligent misrepresentation claim, the trial court granted Fransway's motion. When Smith's attorney asked whether the dismissal "also appl[ied] to the unjust enrichment claim," the trial court answered, "I think so."

On September 18, 1995, the trial court entered an Order for Directed Verdict and Dismissing Various Parties, which stated, *inter alia*, "that no witness appearing on the trial testified as to any specific misrepresentations of [Fransway], nor of conduct on the part of these defendants supporting a claim of quantum meruit or unjust enrichment." On December 20, 1995, however, the trial court, at the hearing on Smith's motion for reconsideration and a new trial, stated, "I don't think I adequately explained the issue of quantum meruit or unjust enrichment." After hearing further argument, the trial court reiterated its directed verdict on quantum meruit and unjust enrichment, concluding, among other things, that: "[t]here was no meeting of the minds;" a "bill was not submitted [for any additional work] during the course of the project;" the evidence did not establish "how much dirt was moved;" there were "major gaps" in the evidence; and the court should not "step in and speculate as to what happened when the record doesn't reveal it." Thus, on January 18, 1996, the trial court entered an order denying Smith's motions after verdict.

At the close of all evidence in a jury trial, "any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof." Section 805.14(4), STATS. Under § 805.14(1), however,

> [n]o motion challenging the sufficiency of the evidence as a matter of law to support a verdict … shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

On appeal, Smith does not challenge the directed verdict and dismissal on the negligent representation claim. Smith does argue, however, that on both quantum meruit and unjust enrichment, it submitted sufficient evidence to take the case to the jury. Smith relies primarily on Karpfinger's testimony. Here, as in the trial court, however, Smith overstates that testimony.

Regarding whether Karpfinger testified that he, as Smith's agent, and Fransway had agreed to an additional payment for additional work, and whether Fransway had ever failed to pay what was due, Smith's trial attorney, arguing the motion for directed verdict, claimed:

> as to the question of whether there is proof in the record that the invoice has never been paid, Mr. Karpfinger testified that he spoke to Mr. Fransway, Roberts Construction about getting paid for all of this extra earth work they were going to be doing. He was continually put off and, basically, he was interpreting it as meaning he wouldn't get paid.
>
> ….
>
> Mr. Karpfinger … said he spoke to Roberts Construction at the time, toward the end of the project, when they were doing this work, had been discussing where the problem came from; and he testified that he did speak to Mr. Fransway, Roberts Construction. I asked him if he ever asked for payment or whether they were going to get paid. That was the contact [sic] of all their discussions at that point; and Mr. Fransway told them they weren't

> going to get paid. He said he was being put off, but that they weren't going to get paid.

Counsel for Fransway immediately interjected, "That's not what he said." Counsel for Fransway was correct.

Karpfinger never testified that he or anyone else from Smith reached any agreement with Fransway regarding the amount of additional work or any payment for it. Karpfinger never testified that he or anyone else from Smith asked for payment or was denied payment. He never testified that Fransway "told them they weren't going to get paid." On the subject of billing and payment, Karpfinger, under cross-examination, testified:

> Q: And, in fact, in terms of the contract price, Stan Smith was fully paid, was he not?
>
> A: I am not privy to that information. I don't know; but I expect he was.
>
> Q: In your experience in terms of your involvement in contracting type jobs, if there is a problem or something unforeseen in the course of doing the job, is there a process by which a request for modification of bid or additional payment can be made?
>
> A: Generally, yes.
>
> Q: That's called a "change order"?
>
> A: Yeah.
>
> Q: In terms of your feeling that you moved more dirt than you anticipated having to do, there was never any invoicing, by change orders, during the process of the grading, was there?
>
> A: That's correct.

> Q: Some time after the work was completely done and the bid price completely paid, Stan Smith invoiced this additional ninety-one thousand five hundred …?
>
> A: One hundred seven thousand nine hundred seventy dollars.

On redirect examination, Karpfinger testified:

> Q: … Is it, therefore, then a common practice that people have discussions and the change in the job is being done while the paper work for the change order is being prepared, is that a common practice?
>
> A: Yes, that's very common.
>
> Q: And sometimes the change order is signed after the fact?
>
> A: Yes. As a matter of fact on this project there were discussions between myself and Robert Fransway about the overage, the amount of dirt that was being moved; and he made it apparent that there would be a combination for those changes.
>
> Q: I don't understand. Combination what?
>
> A: We'd have to figure out what the changes are and straighten it out.
>
> Q: Are you saying that he acknowledged that there was additional yardage?
>
> A: Yes.
>
> Q: Was this in a context of a discussion regarding payment for that additional yardage?
>
> A: That was always the context of that type of discussion, yes.
>
> ….
>
> Q: Would it have been possible in the case of this particular project for the parties to have contemplated the

extra yardage and executed a change order without realizing the extra yardage was there?

A: Well, in hindsight, what probably should have been done is a new survey should have been made. In fact, we did ask for that, and new quantities figured and the price negotiated for that new work.

On recross examination, Karpfinger testified:

Q: You talked about this change order process that sometimes it isn't done right at the time, it's done after the fact?

A: Yes.

Q: But in this instance, we are not talking about a change order after the fact, you are talking about a bill for one hundred seven thousand nine hundred seventy dollars a year or two later, correct?

A: Sometime later. We are talking here about a drastic change in the contract on which there was discussion.

Q: A drastic change in the price for which you submit an invoice?

A: Reflecting a drastic change in the contract.

Q: Are you saying that you had discussions with Mr. Fransway on site to the effect that you were moving better than double the dirt you thought and were going to charge over a hundred thousand dollars for that?

A: No. I had discussions on the site with Mr. Fransway about the great amount of dirt that was in excess of the contract.

Q: There was no agreement reached specifically as to amount or price, was there?

A: That's right. There was no agreement reached according to amount; but the price was established by the original contract, one dollar eighteen per cubic yards.

> Q: And nothing on site in these general discussions specifically changed that price, did it?
>
> A: That's correct.

Nevertheless, at the hearing on Smith's motion for reconsideration and a new trial, Smith's counsel, citing a specific page and line in the record, maintained that Karpfinger "went on and said 'yeah, we submitted the invoice after, but I talked to him during the job and he said he was going to pay for this.'" (quotation marks in transcript). Similarly, on appeal, Smith contends that "Karpfinger testified that Fransway acknowledged the problem and promised to pay $1.18 per yard, the amount called for in the original contract, for the excess fill handled." We have checked the record reference and the full trial transcript. Karpfinger never gave such testimony.

In fact, no evidence even established that Fransway had failed to pay anything that Smith was due. Indeed, although the trial court did not base its directed verdict on Smith's lack of evidence in this regard, Fransway repeatedly and convincingly argued the point. At the close of Smith's evidence, Fransway's counsel acknowledged the invoice for the alleged additional work but stated, "But they don't have any evidence it remains unpaid. That's one of the elements, if it is paid or not. They didn't even put in that. They are subject to dismissal just for that…. We don't even know if they are paid or unpaid in terms of this record." In arguing the motion for directed verdict, Fransway's counsel emphasized that neither Stan Smith nor any other person with knowledge of the billing and payment records had ever testified that Smith was not paid. Counsel asked, "If [Stan Smith] had trouble, for whatever reason, and couldn't be here, why wasn't somebody called adversely and just asked: Have you ever paid the bill?" Counsel

asserted, "we are not entitled to guess what may or may not have happened…. That evidence is just plain missing."

Finally, we note that on appeal Fransway again argues "that there is absolutely no evidence from any witness presented by the appellant that it's [sic] bill for $107,910.00 remains unpaid." Smith offers no reply to that argument. *See* ***Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

Quantum meruit recovery "is based upon an implied contract to pay reasonable compensation for services rendered." ***Ramsey v. Ellis***, 168 Wis.2d 779, 785, 484 N.W.2d 331, 333 (1992). Here, the trial court correctly concluded that no evidence established a "meeting of the minds" to support the existence of an implied contract. Further, no evidence established any failure by Fransway to pay any amount due Smith. Thus, the trial court correctly granted Fransway's motion for directed verdict on the quantum meruit claim.

Unjust enrichment recovery "is based upon the inequity of allowing the defendant to retain a benefit without paying for it" regardless of the existence of an implied contract. ***Id***. Here, the trial court concluded that there were "major gaps" in the evidence and that the evidence failed to establish "how much dirt was moved." The reason for the trial court's conclusion, however, is not entirely clear. After all, as Smith argues, the evidence, viewed most favorably to its case, supported its contention that an additional 93,000 cubic yards of dirt were moved at a value of $1.18 per cubic yard. Unfortunately for Smith, however, not only did the evidence fail to establish that Smith was not paid, but the evidence also failed

to establish whether any of the 93,000 cubic yards was the result of "cut and fill" rather than "grading."

An arguable though apparently hypertechnical distinction between "grading" and "cut and fill" became significant in this case because of a dispute involving admissions. Smith's admissions included:

> 19. Any excess costs incurred by plaintiff with respect to grading work performed at the Springbrook Cercle Project were incurred solely as a result of plaintiff's own negligence, errors or miscalculations with respect to the actual grade elevations of the Springbrook Cercle Project immediately before commencing grading work.
>
> 20. Any excess costs incurred by plaintiff with respect to grading work performed at the Springbrook Cercle Project were incurred solely as a result of plaintiff's negligence, errors or miscalculations concerning the amount of dirt to be moved by plaintiff.

Smith at first tacitly conceded that if those admissions, initially entered with respect to another defendant, applied to its suit against Fransway, its claims would fail. When, however, it appeared that the trial court might deny its motion, under § 804.11(2), STATS., for withdrawal of its admissions with respect to Fransway, Smith adjusted its position. Smith argued that even if the admissions regarding "grading" would defeat its claims with respect to additional "grading," the admissions would not defeat its claims entirely because the additional excavation work involved "cut and fill." On these issues, the record is incredibly convoluted in two respects.

First, the trial court's rulings on whether and/or to what extent the admissions would apply in Smith's action against Fransway are confused and at

times contradictory. At various points, the trial court states or implies that Smith's § 804.11(2), STATS., motion to withdraw the admissions will be granted, will not be granted, might be granted, may be granted in part, were granted, and were not granted. Making sense of the record in this regard is further complicated by the fact that, inexplicably, *after* Fransway had gained dismissal of Smith's suit, Fransway stipulated to the trial court granting Smith's § 804.11(2) motion.

After a painstaking review of the record, we conclude that the trial court ultimately: (1) denied Smith's § 804.11(2), STATS., motion (before Fransway's post-verdict stipulation), thus allowing the evidence of Smith's admissions; but (2) ruled that a factual issue remained regarding whether Smith had performed any "cut and fill," as distinct from "grading," such that "cut and fill" issues would not be eclipsed by Smith's admissions on "grading." The trial court termed its conclusion as "throwing a bone to both side [sic]."

Second, the record on whether "grading" and "cut and fill" are the same or different is almost as ambiguous. Only Thomas Wolfe was questioned on the subject. On four occasions he stated or implied that "grading" and "cut and fill" are the same. He also testified, however, that "on this site," "because of the excess volume of earth," they were different, and that "[i]n specific contracts, often times they are [different]." At no point, however, did Wolfe delineate whether or to what extent "cut and fill" represented any overage in this case. Similarly, even if one were to read Karpfinger's testimony as supporting a claim for additional services, he never delineated whether or to what extent the services were for "cut and fill" rather than for "grading."

Thus, based on what appears to have been the trial court's ruling on the admissions based on the ambiguous testimony on whether "grading" and "cut

and fill" are different, and based on the complete absence of any evidence pegging "cut and fill" to a claimed overage, the trial court, albeit in a rather round-about way, came to the correct conclusion: "major gaps" in the evidence also required a directed verdict on the unjust enrichment claim.

By the Court.–Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.